OCT 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
1020 Court Square Building,
Baltimore 2, Maryland,
Counsel for Petitioners.

The Daily Record Co., Baltimore 3, Md.

SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Jurisdiction	1
Opinions Below	2
Summary Statement	2
Questions Presented	4
Reasons for Granting the Writ	5
BRIEF IN SUPPORT OF PETITION	9
First Point— Rev. Stat. 3115, as construed in its relation to Rev. Stat. 3114 and sought to be applied against petitioners, conflicts with the due process clause of the Fifth Amendment to the Federal Constitution	9
Second Point—The case involves the construction of Rev. Stat. 3115 in its relation to Rev. Stat. 3114. These are statutes of general application and of great importance to shipping interests throughout the country. The case raises questions of obvious importance in the administration of the customs laws and this Court's decision would guide the conduct of similar proceedings in the Treasury Department as well as in other administrative agencies	12
Third Point— The case raises important questions of federal law which have not been but should be decided	

PAGE

by this Court; viz. the nature and extent of hearing and review in proceedings on application for remission of duties under Rev. Stat. 3115, the applicability thereto of the Administrative Procedure Act, (5 U.S.C. A. 1001, etc.) and the validity of the Secretary of the Treasury's delegation of authority to the Collectors and Commissioner of Customs to act upon applications for remission under Rev. Stat. 3115 13

Fourth Point—The case involves the decision of federal questions probably in conflict with applicable decisions of the Supreme Court; in that:

(a) This Court has held that administrative proceedings into which the requirement for a hearing is read to save the statute from constitutional invalidity must comply with the Administrative Procedure Act 16

(b) This Court has held that district courts may review determinations of an administrative officer to determine whether procedures adopted in making such determinations satisfy elementary standards of fairness and reasonableness essential to the due administration of the summary proceeding authorized by Congress, even

PAGE

though the statute does not grant any "rights" in the constitutional sense 16

(c) This Court has held that a district court lacks jurisdiction to enforce action of an administrative agency taken by subordinates under delegation by an administrative officer authorized by Congress to perform the function, but lacking congressional authority to so delegate 19

Conclusion 20

APPENDIX TO BRIEF 21

TABLE OF AUTHORITIES CITED

Cases

Alcoa SS Company v. United States, 338 U. S. 421, 94 L. Ed. 225, 70 S. Ct. 190 6, 12

Bersoff v. Donaldson, 174 F. 2nd 494, (App. D.C. 1949) 15

Bowles v. Willingham, 321 U. S. 503, 88 L. Ed. 892 11

Cudahy Packing Company v. Holland, 315 U. S. 357, 86 L. Ed. 895, 62 S. Ct. 651 7, 20

David L. Moss Company v. United States, 103 F. 2nd 395 13

Eastern Airlines, Inc. v. Civil Aeronautics Board, 178 F. 2nd 726, (App. D.C. 1951) 15

Estep v. United States, 327 U. S. 114 13

Ewing v. Mytinger and Casselberry, 339 U. S. 594, 94 L. Ed. 1088 11

Fischer v. Haeberle, 80 F. Supp. 652, (E.D. N.Y.) 14

PAGE

Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061, 42 S. Ct. 549 ..... 5, 12

Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329, 77 L. Ed. 341 ..... 6, 16-19

Morgan v. United States, 304 U. S. 1 11

Opp Cotton Mills v. Administrator, 312 U. S. 126 11

Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289 11

Southern Railway Company v. Virginia, 290 U. S. 190, 78 L. Ed. 260 10

Stark v. Wickard, 321 U. S. 288 14

Waterman SS Corporation v. United States, 30 C.C. P.A. 119 13

Wong Yang Sung v. McGrath, 339 U. S. 33, 94 L. Ed. 616 ..... 6, 12, 15, 16

Yakus v. United States, 321 U. S. 1 11

Statutes

Rev. Stat. 3114 (19 U.S.C.A. 257) 2-6, 10-12, 21

Rev. Stat. 3115 (19 U.S.C.A. 258) 2-6, 10-14, 16, 19, 21

5 U.S.C.A. 1001, etc. 4, 6, 11

18 U.S.C.A. 281(b) 14

28 U.S.C.A. 1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ------

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, The Cottman Company and Maryland Casualty Company, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered August 2nd, 1951, reversing a decree of the United States District Court for the District of Maryland, dated October 10th, 1950.

JURISDICTION

Jurisdiction is based on 28 U. S. C. A. Section 1254 (1).

OPINIONS BELOW

The District Court's opinion, which is unreported, is found at R. 7. The opinion of the Court of Appeals is found at R. 18 and is reported in 190 Fed. 2nd 805 (adv.).

SUMMARY STATEMENT

The case arose upon a suit by the United States against petitioners on a bond guaranteeing the payment of customs duties found legally due the United States in connection with the arrival of certain vessels in the port of Baltimore.

A duty was assessed against the SS CHATHAM C. LYON and her owners under authority of Rev. Stat. 3114, 19 U. S. C. A. Section 257, which provides that expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an *ad valorem* duty of 50% of the cost thereof in such foreign country; and that the vessel shall be seized and forfeited if the owner or master shall willfully and knowingly neglect or fail to report, make entry and pay the duties so imposed.

The vessel's owners admitting that the repairs upon which the assessment was based were made in a foreign country, asked for remission of the duty under authority of Rev. Stat. 3115,* 19 U. S. C. A. Section 258, which provides in part as follows:

> "If the owner or master of such vessel furnishes good and sufficient evidence—

---

* This statute and Rev. Stat. 3114 are set out in full in an appendix to Petitioners' Brief in support of Petition.

> (1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination; * * *, then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture * * *."

The Collector at Baltimore and thereafter the Commissioner of Customs denied the application for remission without hearing.

When the duty was not paid, the government brought this suit in the United States District Court for the District of Maryland, against petitioners on the bond. The District Court held that the vessel owner was entitled to a formal hearing in accordance with the Administrative Procedure Act, 5 U. S. C. A. 1001, etc., and thereafter to review by the District Court before suit on the bond could be maintained. The Government's suit was thereupon dismissed with leave granted the United States to proceed at the administrative level in accordance with the District Court's opinion.

On appeal, the case was reversed and remanded to the District Court with direction to enter judgment on the bond for the United States, the Court of Appeals holding that no matter constituting a defense had been asserted. The matter of remission was treated as being wholly within the discretion of the Secretary of the Treasury and the case was disposed of on the theory that there is no defense to the duty assessed under Rev. Stat. 3114 unless the Secretary remits it under Rev. Stat. 3115, which he has not done (R. Op. 20). It was further held that there

is adequate statutory authority for the delegation by the Secretary of his duties under Rev. Stat. 3115, to the Collectors and Commissioner of Customs, but even if the delegation was invalid, petitioners could not assert that invalidity in defense to this suit. Review of the Secretary's action to the extent any review is available was held to be within the exclusive jurisdiction of the Customs Court, and the Administrative Procedure Act was held to have no application.

Petitioners contend and will show in their brief that the Court of Appeals complete approval of administrative practices in the Treasury Department in connection with the remission of duties under Rev. Stat. 3115 is contrary to the decisions of this Court and ought not to be sustained.

QUESTIONS PRESENTED

1. Does Rev. Stat. 3115, 19 U. S. C. A. 258, require a hearing before final denial of an application for remission thereunder in order to conform to the due process clause of the Fifth Amendment?

2. Assuming the due process clause does not apply, does the language of Rev. Stat. 3115 nevertheless contemplate that a hearing was intended in order that the administrative determination will satisfy elementary standards of fairness and reasonableness.

3. If a hearing is required in proceedings under Rev. Stat. 3115 either as a matter of due process of law or to satisfy elementary standards of fairness and reasonableness, does this requirement bring the matter within the coverage of the Administrative Procedure Act, 5 U. S. C. A. 1001, etc., including its review provisions?

4. If on an application for remission under Rev. Stat. 3115 a hearing is required by the due process clause or the need for a hearing is to be implied from the language of the Statute in order to satisfy elementary standards of fairness and reasonableness, can one whose application for remission has been denied without a hearing assert that fact in defense to the Government's suit in a United States District Court to collect the duty sought to be remitted?

5. Can the Secretary of the Treasury validly delegate his duties under Rev. Stat. 3115, 19 U. S. C. A. 258, to the Collectors and the Commissioner of Customs?

6. If the Secretary cannot validly delegate such duties to the Commissioner and Collectors of Customs, can one whose application for remission has been denied by a Collector and the Commissioner of Customs, acting under such invalid delegation, assert that fact in defense to the Government's suit in a United States District Court to collect the duty sought to be remitted?

REASONS FOR GRANTING THE WRIT

1. Petitioners contend that Rev. Stat. 3115 as construed in relation to Rev. Stat. 3114 and as sought to be applied against them, conflicts with the due process clause of the Fifth Amendment to the Federal Constitution. This point is substantial and sufficient to support the jurisdiction of this Court. *Lipke v. Lederer*, 259 U. S. 557, 66 L. Ed. 1061, 1064, 42 S. Ct. 549.

2. The case involves the construction of Rev. Stat. 3115 and its relation to Rev. Stat. 3114. These statutes are of general application and of great importance to shipping interests throughout the country. This Court's construction would guide the handling of proceedings under Rev.

Stat. 3115 in the future, and is of obvious importance in the administration of the Customs laws. Cf. *Alcoa SS Company v. United States*, 338 U. S. 421, 423, 94 L. Ed. 225, 229, 70 S. Ct. 190; *Wong Yang Sung v. McGrath*, 339 U. S. 33, 36, 94 L. Ed. 616, 628.

3. The case raises important questions of federal law which have not been, but should be decided by this Court; viz. the nature and extent of hearing and review in proceedings on application for remission of duties under Rev. Stat. 3115, the applicability thereto of the Administrative Procedure Act (5 U. S. C. A. 1001, etc.) and the validity of the Secretary of the Treasury's delegation of authority to the Collectors and Commissioner of Customs to act upon applications for remission under Rev. Stat. 3115.

4. The case involves the decision of federal questions probably in conflict with applicable decisions of the Supreme Court; in that

(a) This Court has held that administrative proceedings into which the requirement for a hearing is read to save the statute from constitutional invalidity must comply with the Administrative Procedure Act. *Wong Yang Sung v. McGrath*, supra.

(b) This Court has held that district courts may review determinations of an administrative officer to determine whether procedures adopted in making such determinations satisfy elementary standards of fairness and reasonableness essential to the due administration of the summary proceeding authorized by Congress, even though the statute does not grant any "rights" in the constitutional sense. *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329, 77 L. Ed. 341.

(c) This Court has held that a district court lacks jurisdiction to enforce action of an administrative agency taken by subordinates under delegation by an administrative officer authorized by Congress to perform the function, but lacking congressional authority to so delegate. *Cudahy Packing Company v. Holland*, 315 U. S. 357, 86 L. Ed. 895, 62 S. Ct. 651.

Wherefore petitioners pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit directing it to send to this Court for review a full transcript of the record and of the proceedings in the case numbered and entitled on its docket "No. 6248, United States of America, Appellant, versus The Cottman Company, a body corporate, and Maryland Casualty Company, a body corporate, Appellees," to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Fourth Circuit be reversed and remanded by this Court, and for such further relief as to this Court may seem proper.

THE COTTMAN COMPANY,

MARYLAND CASUALTY COMPANY,

By JOHN H. SKEEN, JR.,

WILLIAM A. SKEEN,

Counsel for Petitioners.

Dated: October 29, 1951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ------

THE COTTMAN COMPANY, A BODY CORPORATE, AND
MARYLAND CASUALTY COMPANY,
A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FIRST POINT

Petitioners contend that Rev. Stat. 3115 as construed in its relation to Rev. Stat. 3114 and sought to be applied against them, conflicts with the due process clause of the Fifth Amendment to the Federal Constitution.

It is conceded by the Government that, although the application for remission filed by the vessel's owners in this case has been finally denied and the duty is now sought to be enforced by suit on petitioners' bond, no opportunity for a hearing on the merits of the application has ever been afforded. The Government asserts that it has been

the practice in the Treasury Department for many years to take final action upon similar petitions for remission without formal hearings. In justification of the practice it is said that this long-established administrative interpretation overrides any original reading of the statute as contemplating a hearing, that Congress has twice reenacted the statute without expressly requiring a hearing, and that applicants for remission have no "rights" under the statute in the constitutional sense because Rev. Stat. 3115 does not itself impose any liability to forfeiture but, rather, provides for relief from possible forfeiture should the petition for remission be granted. It is said that because Congress has the power to require payment of the duty on imports covered by Rev. Stat. 3114 without reference to how or why the repairs were made, its authorization to the Treasury Department to remit if the prescribed conditions are fulfilled merely constituted an act of legislative grace.

This Court, however, has said that from the mere fact that the legislature might, without notice or hearing, require by direct order the doing of a certain act, it does not follow that an administrative officer may be empowered, without notice or hearing, to order the same act upon his own opinions and with finality. "There is an obvious difference between legislative determination and the findings of an administrative official not supported by the evidence. In theory, at least, the legislature acts upon adequate knowledge, after full consideration and through members who represent the entire public." *Southern Railway Company v. Virginia*, 290 U. S. 190, 197; 78 L. Ed. 260, 266.

Petitioners submit that Congress could not have intended the Secretary to exercise the unrestrained authority he is said to have under Rev. Stat. 3115. What he does or fails to do can gravely affect substantial property rights. It is

unduly technical and thoroughly unrealistic to say that Congress intended foreign vessel repairs in fact necessitated by stress of weather to be dutiable merely because the Secretary failed to perform his functions under Rev. Stat. 3115. Yet, if he does nothing at all, or arbitrarily denies an application, according to the interpretation given the statute by the Treasury Department and sustained by the Court of Appeals in this case, the owner must pay the duty or his vessel is liable to forfeiture. And the Customs Court, while it will review *de novo* the validity of an assessment under Rev. Stat. 3114 has consistently held it cannot review anything done by the Secretary under Rev. Stat. 3115.

Rev. Stat. 3115 clearly envisages a quasi-judicial determination affecting substantial property rights. This Court has frequently held that where an administrative body is entrusted with quasi-judicial functions, due process of law requires that there be an opportunity for a hearing at some point before final determination. *Ewing v. Mytinger and Casselberry*, 339 U. S. 594, 599, 94 L. Ed. 1088, 1094; *Phillips v. Commissioner*, 283 U. S. 589, 596, 597, 75 L. Ed. 1289, 1296, 1297; *Bowles v. Willingham*, 321 U. S. 503, 520, 88 L. Ed. 892, 906; *Yakus v. United States*, 321 U. S. 1, 14, 15; *Morgan v. United States*, 304 U. S. 1; *Opp Cotton Mills v. Administrator*, 312 U. S. 126.

It is petitioners further contention that a complete denial of any hearing cannot be sustained on such insubstantial grounds as administrative interpretation, no matter of how long duration, or by the so-called doctrine of legislative approval. It is contended, infra p. 16, that the hearing which should have been afforded under Rev. Stat. 3115 must be a hearing of the kind prescribed by the Administrative Procedure Act, 5 U. S. C. A. 1001, etc. This Court has said that that Act is to be broadly applied to give effect to its remedial purposes where the evils it was

aimed at appear. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 41; 94 L. Ed. 616, 624. Any presumptions which may have formerly existed by reason of an administrative interpretation favoring the denial of a hearing, ought not now to be given any force in the light of the Administrative Procedure Act and its purposes as enunciated by this Court. Petitioners believe that the case has been shown to involve a constitutional question of substantial importance and one which justifies the exercise of jurisdiction by this Court. *Lipke v. Lederer*, 259 U. S. 557; 66 L. Ed. 1061, 1064.

SECOND POINT

The case involves the construction of Rev. Stat. 3115 in its relation to Rev. Stat. 3114. These are statutes of general application and of great importance to shipping interests throughout the country. The case raises questions of obvious importance in the administration of the customs laws and this Court's decision would guide the conduct of similar proceedings in the Treasury Department as well as in other administrative agencies. Cf. Alcoa SS Company v. United States, 338 U. S. 421; Wong Yang Sung v. McGrath, 339 U. S. 33, 36, 94 L. Ed. 616, 628.

The questions here presented are of sufficient gravity and general importance to fully justify the grant of review by this Court. The Court of Appeals' approval of the administrative practice of the Treasury Department under Rev. Stat. 3115, if not reversed, will leave all vessel owners exposed to the caprice of subordinates in the Treasury Department, and will lend encouragement to other administrative bodies to adopt practices which may not conform to ordinary standards of fairness and reasonableness.

THIRD POINT

The case raises important questions of Federal law which have not been but should be decided by this Court.

It has frequently been held that the Customs Court is the exclusive tribunal for adjudication of questions involving customs laws and duties. *David L. Moss Company v. United States*, 103 F. 2nd 395, 397. It has also been held by the customs courts that action taken by the Secretary on a petition for remission under Rev. Stat. 3115 will not be reviewed there, or in any court. *Waterman SS Corporation v. United States*, 30 C.C.P.A. 119. But the Court of Appeals in this case holds that a district court must enforce a duty where the duty was sought to be remitted and remission was denied without a hearing and that a district court may make no inquiry into the validity or conduct of the proceedings resulting in denial. This decision threatens the power of district courts to decide questions before them according to law and is believed to be contrary to the decisions of this Court. In *Estep v. United States*, 327 U. S. 114. This Court held that a registrant under the Selective Service Act must be given an opportunity to show that his local board exceeded its jurisdiction by way of defense to a criminal prosecution for failure to submit to induction, despite the fact that the statute specifically provided that decisions of the local boards as to classification were final. This Court said, at pages 121, 122,

> "We cannot read paragraph 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. * * * We cannot readily infer that Congress departed so far from

> the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an adminstrative agency * * *."

No more should it be inferred in the case at bar that Congress intended to make an administrative decision of the Treasury Department final and unreviewable so as to require these petitioners to pay under a bond upon which their liability has not been finally determined, or subject the vessel involved to forfeiture on the basis of invalid administrative action. *cf. Stark v. Wickard*, 321 U. S. 288; *Fischer v. Haeberle*, 80 F. Supp. 652, (E. D. N. Y.).

In addition, the Court of Appeals in this case was the first court to pass directly on the validity of the Secretary's delegation to the Collectors of Customs under Rev. Stat. 3115. Although holding that even if the delegation was invalid, petitioners would still be liable on the bond, the Court of Appeals specifically sustained its validity (R. Op. 21-22). On the other hand, even the Court of Customs and Patent Appeals has earlier implied that there was substance to the challenge to the validity of the Secretary's delegation, but that Court declined to decide the point on the ground that it had not been raised in the protest. *Waterman SS Company v. U. S.*, supra. Petitioners contend that there is very real doubt of the Secretary's authority in this regard. It is conceded by the Government that the duties required of him under Rev. Stat. 3115 are of a kind which are non-delegable in the absence of specific statutory authority. But the only statutory authority on which the Government relies; viz, 18 U. S. C. A. 281 (b), authorizes delegation of duties only in connection with the importation of "merchandise," and the Court of Appeals'

conclusion that the term "merchandise" includes expenses of vessel repairs is, we submit, erroneous. This point is substantial and of grave importance to the Treasury Department as well as to vessel owners throughout the country. This Court ought not to allow an administrative officer to continue to exercise authority beyond that specifically granted him by Congress.

The Court of Appeals further said that it would "be unreasonable to require that (the Secretary) personally hold hearings and pass upon the remission of customs duties under this statute" (R. Op. 21). Petitioners submit that to the extent the feeling thus expressed influenced its conclusion that the delegation was valid, the Court was in error. If the duties are onerous and it is manifestly necessary that they be delegated, it is, of course, for Congress to do so. This Court should not encourage the impression that the opinions of lower federal courts are influenced by their ideas of what ought to be done legislatively.

The Court of Appeals held that the Administrative Procedure Act has no application to proceedings for remission of duties under Rev. Stat. 3115 (R. Op. 23). The applicability of the Administrative Procedure Act to this particular proceeding has not been decided by this Court. Petitioners discuss later in this brief the case of *Wong Yang Sung v. McGrath*, supra, and contend that this proceeding is subject to the Act under the rationale of the decision in that case, infra, p. 16. But further decision of this Court is needed to resolve questions resulting from claims of exemption from the Administrative Procedure Act by various administrative bodies. Decisions of lower federal courts upholding claims of exemptions of the Post Office (*Bersoff v. Donaldson*, 174 F. 2d 494, App. D. C. 1949) and of the Civil Aeronautics Board (*Eastern Airlines Inc. v.*

Civil Aeronautics Board, 178 F. 2d 726, App. D. C. 1951) have created doubts as to the extent to which this Court will apply its statement in *Wong Yang Sung*, supra at page 41, that "* * * it would be a disservice to our form of Government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it is aimed at appear." The present case affords this Court an opportunity to put an end to the tendency among administrative agencies to assert exemption claims which would undermine the purpose and effect of the Act.

FOURTH POINT

This case involves decisions of Federal questions probably in conflict with applicable decisions of the Supreme Court.

(a) In overruling petitioners' contentions that there should have been a hearing of the type afforded by the Administrative Procedure Act and that the District Court had the power to review under paragraph 10 of that Act, the Court of Appeals held that the Administrative Procedure Act had no application (R. Op. 23).

We have discussed under the first point of this brief reasons why petitioners believe a hearing should have been granted as a matter of due process of law, supra, p. 9. If a hearing should have been afforded, there can be no doubt under the plain language of this Court in *Wong Yang Sung v. McGrath*, supra that the hearing afforded must have been of the kind prescribed by the Administrative Procedure Act.

(b) *In Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329, 77 L. Ed. 341 this Court construed Section 9 of the Immigration Act of 1917. That section provided that, if it

shall appear to the satisfaction of the Secretary of Labor that any alien has been brought into the United States in violation of provisions declaring it unlawful to bring to the United States certain aliens afflicted with certain diseases and disabilities which might have been detected at the time of foreign embarkation by competent medical examination, the person or transportation company bringing such alien to the United States, shall pay a stated fine. It was held that this statute contemplated that the Secretary shall fairly determine *after a hearing* and upon the evidence, the facts establishing violation of the statute, notwithstanding that the examining physician may certify that the disease or disability was discoverable at the time of foreign embarkation.

Lloyd Sabaudo Societa Anonima v. Elting, supra, is especially significant here, because it sustains the proposition that even if there is no "right" in the constitutional sense, district courts nevertheless have jurisdiction to review administrative action for the purpose of determining whether the procedure adopted in making the administrative determination "satisfies elementary standards of fairness and reasonableness essential to the due administration of the summary proceeding which Congress has authorized." (287 U. S. 329, 336.)

Petitioners do not concede that the present case does not involve "rights" in the constitutional sense as the Government contends and as the Court of Appeals seems to have held (R. Op. 20). For the reasons heretofore given under the First Point of this brief, supra, p. 9, it is earnestly maintained that substantial property rights are involved. However, whether "rights" in the constitutional sense are involved or not, a hearing should have been granted and district courts may exercise jurisdiction, as the District

Court properly did in the case at bar, to see that "elementary standards of fairness and reasonableness" are conformed to.

This Court specifically noted in *Lloyd Sabaudo Societa Anonima v. Elting,* at 287 U. S. 335, et seq.:

> "* * * the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to control the admission of aliens, and due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them."

This Court went on to say that,

> "The action of the Secretary is nevertheless subject to some judicial review as the courts below held. The courts may determine whether his action is within his statutory authority, * * * whether there was any evidence before him to support his determination * * * and whether the procedure which he adopted in making it satisfies elementary standards of fairness and reasonableness, essential to the due administration of the summary proceedings which Congress has authorized. * * *
>
> "The statute plainly authorizes the imposition of the fine only if it shall appear, to the satisfaction of the Secretary, that the existence of the disease or disability for which the alien was excluded, 'might have been detected by means of a competent medical examination' at the time of sailing. That §9 imposed upon the Secretary the official duty and responsibility of making such a determination was held by both courts below and is

> not questioned by the Government. Accordingly, his action in particular cases is subject to judicial review, within the limits mentioned."

The Court then concluded that the statute contemplates that the Secretary should fairly determine, after a hearing and upon the evidence, the facts establishing violation and at page 339 said:

> "The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands."

As has been shown, the effect of decisions of the customs courts where review has been sought of the Secretary's action under Rev. Stat. 3115, is that his power is wholly uncontrolled. The District Court in this case held that his activities were subject to judicial control to the extent that it would not lend its aid to the enforcement of a duty the remission of which had been summarily denied without a hearing. That the District Court's view was correct and in accordance with the views of this Court seems clear from the above-quoted expressions from *Lloyd Sabaudo Societa Anonima v. Elting*, supra. The decision of the Court of Appeals is in conflict with the views therein expressed and should therefore be reviewed and corrected.

(c) The Court of Appeals, assuming the delegation by the Secretary to the Collectors and Commissioner of Customs to be invalid, held that although the failure of the Secretary of the Treasury to act personally under Rev. Stat. 3115, might in a proper case serve as the basis for a

petition for mandamus against him, such failure could not possibly constitute a defense to an action in a District Court to collect the duty assessed (R. Op. 22-3).

It is submitted that this reasoning is opposed in principle to the decision of this Court in *Cudahy Packing Company v. Holland,* 315 U. S. 357; 86 L. Ed. 895, wherein it was held that a district court lacked jurisdiction to enforce subpoenas issued by members of the Federal Trade Commission under invalid delegation from the Secretary of Labor.

Petitioners have heretofore shown the fallacy of the reasoning of the Court of Appeals whereby it concluded that nothing the Secretary does or fails to do short of actual remission will constitute a defense to this suit on the bond, supra pp. 10-11. This reasoning could have the practical effect of requiring the federal courts to enforce duties on items which would not be dutiable at all, but for the failure of an administrative officer to perform functions required of him by Congress. We have also discussed under the Third Point of this brief the basis for petitioners' contention that the delegation was in fact invalid.

CONCLUSION

The writ of certiorari prayed for should be granted and the decision of the United States Court of Appeals Fourth Circuit reversed.

Respectfully submitted,

JOHN H. SKEEN, JR.,

WILLIAM A. SKEEN,

Counsel for Petitioners.

October 29, 1951.

APPENDIX TO BRIEF

REV. STAT. 3114, 19 U. S. C. A., SECTION 257—DUTY ON EQUIPMENTS OR REPAIR PARTS FOR VESSELS.

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs. (Rev. Stat. §3114; Sept. 21, 1922, c. 356, Title IV, §466, 42 Stat. 957; June 17, 1930, c. 497, Title IV, §466, 46 Stat. 719.)

REV. STAT. 3115, 19 U. S. C. A., SECTION 258—REMISSION FOR NECESSARY REPAIRS.

If the owner or master of such vessel furnishes good and sufficient evidence—

(1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination; or

(2) That such equipments or parts thereof or repair parts or materials, were manufactured or produced in the United States, and the labor necessary to install such equipments or to make such repairs was performed by residents of the United States, or by members of the regular crew of such vessel,

then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture, and no license or enrollment and license, or renewal of either, shall hereafter be issued to any such vessel until the collector to whom application is made for the same shall be satisfied, from the oath of the owner or master, that all such equipments and repairs made within the year immediately preceding such application have been duly accounted for under the provisions of this section and section 257 of this title, and the duties accruing thereon duly paid; and if such owner or master shall refuse to take such oath, or take it falsely, the vessel shall be seized and forfeited. (Rev. Stat. §3115; Sept. 21, 1922, c. 356, Title IV, §466, 42 Stat. 957; June 17, 1930, c. 497, Title IV, §466, 46 Stat. 719.)

INDEX

	Page
Argument	1
1. Delegability of remission power	1
2. Requirement of administrative hearing	2
3. Jurisdiction	2
Conclusion	4
Opinions below	7
Jurisdiction	8
Questions presented	13
Statutes and regulations involved	19
Statement	25

CITATIONS

Cases:

Anderson v. *Helvering*, 310 U.S. 404	16
Apex Hosiery Co. v. *Leader*, 310 U.S. 469	17
Berry, J.W.V. v. *United States*, 57 Treas. Dec. 1067	20
Boske v. *Comingore*, 177 U.S. 459	13
Boston Wool Trade Assn. v. *Snyder*, 161 F. 2d 648	23
Bowen v. *Johnston*, 306 U.S. 19	13
Cottman Co. v. *Dailey*, 94 F. 2d 85	23
David L. Moss Co. v. *United States*, 103 F. 2d 395	23
Deputy v. *DuPont*, 308 U.S. 488	16
E. E. Kelly & Co. v. *United States*, 53 Treas. Dec. 1015	20
Ellery, William H. v. *United States*, 42 Treas. Dec. 405	20
Folger, M. H. v. *United States*, T. D. 12305, G.A. 1077	20
Gulbenkian v. *United States*, 186 Fed. 133	23
Hammermill Paper Co. v. *United States*, 48 Treas. Dec. 269	20
Helvering v. *Bankline Oil Co.*, 303 U.S. 362	15
Interstate Transit Lines v. *Comm'r*, 319 U.S. 590	16
Lykes Bros. v. *United States*, C. D. 518, 6 Cust. Ct. 467	20
Mills & Gibb v. *United States*, 8 Ct. of Cust. Apps. 31, T.D. 37164	20
Missouri v. *Ross*, 299 U.S. 72	17
New Colonial Co. v. *Helvering*, 292 U.S. 435	15
Nichols v. *United States*, 7 Wall. (74 U.S.) 122	23
Patchogue-Plymouth Mills Corp. v. *Durning*, 101 F. 2d 41	23
Pioneer Steamship Co. v. *United States*, 37 Treas. Dec. 338	20
Portland California Steamship Co. v. *United States*, C. D. 889, 13 Cust. Ct. 170	20, 21
Riccomini v. *United States*, 69 F. 2d 480	23

Cases—Continued

	Page
Sullivan v. *United States*, 44 Treas. Dec. 493	20
United States v. *Citizens Loan Co.*, 316 U.S. 209	13
United States v. *Madigan*, 300 U.S. 500	13
United States v. *Sherman & Sons Co.*, 237 U.S. 146	23
United States v. *South Buffalo R. Co.*, 333 U.S. 771	17
Waterman Steamship Corp. v. *United States*, 30 C.C.P.A. (Customs) 119	20, 22, 23
Wong Yang Sung v. *McGrath*, 339 U.S. 33	12, 17, 19

Constitution and Statutes:

Constitution:	
Article I, sec. 8, cl. 1	15
Act of July 18, 1866, 14 Stat. 184	16
Administrative Procedure Act, 5 U.S.C. 1001 et seq.:	
Section 5	17
Section 7	17
Section 8	17
Section 10	6, 23, 24
Section 11	17
Customs Administration Act of 1890, Section 12 (26 Stat. 136)	20
Customs Reorganization Act of March 3, 1927 (44 Stat. 1381, 1382), Section 3(a) (5 U.S.C. 281 b(a))	10
Rev. Stat. 3114 (19 U.S.C. 257)	2, 5, 8, 14, 15, 24
Rev. Stat. 3115 (19 U.S.C. 258)	3, 5, 7, 8, 9, 10, 12, 14, 15, 16, 20, 22, 24
Tariff Act of 1922 (42 Stat. 858, 957-958, 964):	
Section 466	9, 12, 22, 23
Section 498	9
Tariff Act of 1930:	
Section 466 (46 Stat. 719)	12, 17, 22
Section 498 (46 Stat. 728)	9
Section 514 (46 Stat. 734, 19 U.S.C. 1514, now 28 U.S.C. 1583)	14
Section 515 (46 Stat. 734, 19 U.S.C. 1515, now 28 U.S.C. 2637)	14
Section 643 (46 Stat. 761)	12
44 Stat. 669	20
1 U.S.C (Supp. IV) 204(a)	12
5 U.S.C. 281b(a)	3, 8, 10, 12
19 U.S.C. 1001-1654	12
19 U.S.C. 1514	20
19 U.S.C. 1643	12
28 U.S.C. 1252	14
28 U.S.C. 1256	14
28 U.S.C. 1340	20

Miscellaneous:

	Page
28 U.S.C. 1541	14
28 U.S.C. 1583	20
19 C.F.R. (Cum. Supp.) Section 4.14	8
67 Cong. Rec. 8318	11
67 Cong. Rec. 8322	12
Customs Regulations (1931), Art. 127, Par. 7	8
15 Fed. Reg. 6521	13
Hearings before Senate Committee on Judiciary, on S. 674, 675, 918, 77th Cong., 1st Sess., pp. 1390, 251, 148-149, 791-992	18
H. Rep. 1980, 79th Cong., 2d Sess.	18
H. Rep. No. 308, 80th Cong., 1st Sess.	24
H. Rep. No. 758, 69th Cong., 1st Sess.	10, 11
Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935):	
Section 1	13
Section 2	13
Sen. Doc. No. 248, 79th Cong., 2d Sess.	18
S. Rep. No. 890, 69th Cong., 1st Sess.	11
S. Rep. 752, 79th Cong., 1st Sess.	18
S. Rep. 1198, 69th Cong., 2d Sess.	11
T.D. 44224 (September 3, 1930)	8
T.D. 50192 (5 Fed. Reg. 2573)	4
T.D. 51584 (11 Fed. Reg. 14511)	4, 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 7-14) is not officially reported. The opinion of the United States Court of Appeals for the Fourth Circuit (R. 18-24) is reported at 190 F. 2d 805.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 24). The petition for a writ of certiorari was filed on October 30,

1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Treasury Decision 51584 (11 Fed. Reg. 14511), whereby the Secretary of the Treasury undertook to delegate to the collectors of customs and the Commissioner of Customs his authority under Rev. Stat. 3115 (19 U.S.C. 258) to remit duties assessed under Rev. Stat. 3114 (19 U.S.C. 257), on foreign repairs to vessels, is invalid.

2. Whether petitioners had a right, constitutional or statutory (under Rev. Stat. 3115 or the Administrative Procedure Act), to an administrative hearing on their petition for remission of duties filed under Rev. Stat. 3115.

3. Whether a suit by the Government in the United States district court to recover duties validly assessed under Rev. Stat. 3114, may be dismissed on the ground that the defendants' petition for remission of these duties filed under Rev. Stat. 3115 was improperly denied.

STATUTES AND REGULATIONS INVOLVED

1. Rev. Stat. 3114, as amended (19 U.S.C. 257), provides in pertinent part:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United

States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; * * *

2. Rev. Stat. 3115, as amended (19 U.S.C. 258), provides in pertinent part:

If the owner or master of such vessel furnishes good and sufficient evidence—

(1) That such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination;

* * * * *

then the Secretary of the Treasury is authorized to remit or refund such duties, and such vessel shall not be liable to forfeiture, * * *

3. 5 U.S.C. 281b(a) provides:

The Secretary of the Treasury is authorized to confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treas-

ury by the Tariff Act of September 21, 1922 (ch. 356, 42 Stat. 858), or any other law.

4. T.D. 51584 (11 Fed. Reg. 14511) amended the Secretary's general delegation of authority in customs matters to the Commissioner of Customs (T.D. 50192, 5 Fed. Reg. 2573) by further providing:

> Duties accruing under section 3114, Revised Statutes of the United States, as amended by section 466, Tariff Act of 1930, relating to equipment and repairs of vessels, may be remitted or refunded by the collector of customs concerned, under the conditions specified in section 3115, Revised Statutes of the United States, as amended by section 466 of the tariff act, upon the receipt of an appropriate application for relief from such duties, but his refusal to remit or refund any such duties pursuant to a claim for relief under said section 3115, Revised Statutes, shall be subject to review by the Commissioner of Customs upon application therefor. The right and power so to remit or refund such duties is hereby conferred upon the several collectors and their successors in office.

STATEMENT

On May 31, 1946, The Cottman Company, as principal, and the Maryland Casualty Company, as surety, executed a bond (Customs Form 7569) in the amount of $25,000 in favor of the United States (R. 3). One of the conditions of the bond was that The Cottman Company would pay to the

collector of customs at the Port of Baltimore, Maryland, promptly on demand, any duties found legally due the United States from the master or other proper officer or owner of vessels arriving at Baltimore during the period of July 1, 1946, to June 30, 1947, for which The Cottman Company acted as agent (R. 3).

In May 1947, while the bond was still in effect, the S.S. CHATHAM C. LYON, an American vessel owned by Isbrandtsen Co., Inc., for which The Cottman Company acted as agent, arrived at Baltimore (R. 3). The master of the vessel, acting for The Cottman Company, executed an entry of repairs made in foreign countries upon the vessel in the value, in United States money, of $4661.00 (R. 3). The collector of customs at Baltimore assessed the 50 percent *ad valorem* duty, amounting to $2330.50, required by Rev. Stat. 3114 (19 U.S.C. 257, *supra,* pp. 2-3) to be paid on these repairs (R. 3). Petitioners filed a petition, together with supporting letters, for remission or refund of this duty under Rev. Stat. 3115 (19 U.S.C. 258, *supra,* p. 3) on the ground that the repairs were compelled "by stress of weather or other casualty." In accordance with the delegation of the Secretary of the Treasury contained in T.D. 51584 (11 Fed. Reg. 14511, *supra,* p. 4) the petition was acted upon and denied first by the collector of customs at Baltimore and subsequently by the Commissioner of Customs.

Upon petitioners' refusal to pay the assessed duty, the United States filed this suit in the United States District Court for the District of Maryland to collect the amount of the assessed duty (R. 3-4). In their answer, petitioners claimed that they were entitled to a *de novo* hearing in the district court on the merits of their petition for remission (R. 6). In the alternative, they asked that the proceedings be remanded to the Secretary of the Treasury with directions to grant "a true and proper hearing" (R. 6). They claimed that the proceedings on their petition for remission had been improper because, they urged, (1) the Secretary of the Treasury was without authority to delegate the remission power to the Commissioner of Customs and the customs collectors, as he had undertaken to do here; (2) they had not been accorded the oral hearing on the petition, to which they were entitled; and (3) on the merits, the petition should have been granted (R. 6-7).

The district court, pointing to Section 10 of the Administrative Procedure Act (5 U.S.C. 1009), assumed, contrary to the Government's contention, that the court had jurisdiction to pass upon petitioners' claims in regard to the denial of remission. The court then went on to hold (1) that the Secretary of the Treasury's delegation of his authority to remit under Rev. Stat. 3115 was invalid (R. 9-11); and (2) that the Administrative Procedure Act, taken together with Rev. Stat. 3115, re-

quires that hearings conforming to the provisions of the Administrative Procedure Act be held in connection with a decision whether or not to remit these duties (R. 11). The district court, accordingly, entered an order dismissing the complaint, with leave granted to petitioners to proceed in accordance with its opinion (R. 14).

On appeal by the Government, the court below reversed (R. 24). Holding that the district court's rulings in regard to Rev. Stat. 3115 were erroneous, and that in any case, these issues could not properly be raised in a suit by the Government to collect duties assessed under Rev. Stat. 3114, the court below remanded the case to the district court with directions to enter judgment in accordance with the prayer of the complaint (R. 18-24).

ARGUMENT

There is, we submit, no merit to petitioners' claims in regard to the two questions which it basically seeks to raise here:—(1) the validity of the Secretary of the Treasury's delegation to the collectors of customs of the power to remit duties under Rev. Stat. 3115 (19 U.S.C. 258) and (2) the necessity of an administrative hearing, either as a constitutional or statutory matter (under Rev. Stat. 3115 or the Administrative Procedure Act), on Rev. Stat. 3115 petitions for remission. Moreover, these issues may not be raised in a proceeding such as this, where the Govern-

ment is seeking to collect the duties assessed under Rev. Stat. 3114. In these circumstances, the reversal by the court below of the district court's dismissal of the Government's action is clearly correct and review by this Court is unwarranted.

1. *Delegability of Remission Power:* (a). T.D. 51584[1] (*supra,* p. 4) by which the Secretary of the Treasury delegated his power to remit under Rev. Stat. 3115 is, we submit, plainly within 5 U.S.C. 281b(a), *supra,* pp. 3-4, which authorizes the Secretary to

> confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treasury by the Tariff Act of September 21, 1922 (ch. 356, 42 Stat. 858), or any other law.[2]

---

[1] This regulation codified the practice within the Treasury Department dating back at least to 1930 whereby Rev. Stat. 3115 petitions for remission were disposed of within the Bureau of Customs. See, *e.g.*, T.D. 44224 (September 3, 1930); *Customs Regulations* (1931), Art. 127, Par. g; 19 C.F.R. (Cum. Supp.) Section 4.14.

[2] It is noteworthy that although the district court held the delegation invalid, it recognized that action on the petition for remission should be not by the Secretary himself but rather by his "direct representative" (R. 11). Since, as the court below said, "it is manifestly necessary that he delegate duties of this sort to subordinate officials in the Treasury Department * * * there could be no more appropriate delegation of the duty imposed by this statute than to those having charge of the collection of customs" (R. 21-22).

Although the dictionary definition of "merchandise" does not extend to "vessel repairs," Congress used "merchandise" expressly to include the vessel repairs embraced by Rev. Stat. 3115, both before and after the enactment of 5 U.S.C. 281b(a) in 1927. Thus, in Section 498 of the Tariff Act of 1922 (42 Stat. 964) Congress authorized the Secretary of the Treasury to prescribe rules and regulations for the declaration and entry of

> (9) Merchandise within the provisions of sections 465 and 466 of this Act at the first point of arrival.

Since Section 466 of the 1922 Tariff Act amends and reenacts Rev. Stat. 3114 and 3115 (see 42 Stat. 957-958), the plain inference from this provision is that the vessel repairs, etc. dealt with in Rev. Stat. 3115 were, so far as Congress was concerned, to be considered as merchandise for the purpose of the customs laws. This was made explicit in the 1930 Tariff Act, where Congress amended paragraph (9) of Section 498 to read (46 Stat. 728):

> Merchandise within the provisions of sections 465 and 466 of this Act (relating to supplies, repairs, and equipment on vessels and railway cars) at the first port of arrival.

The addition of the language in the parenthesis, expressly referring to repairs and equipment, makes it plain that Congress regarded Rev. Stat. 3115 as dealing with merchandise and, accordingly,

suggests a similar reading of "merchandise" in 5 U.S.C. 281b(a).

This reading of "merchandise" is in accord with the purposes for which Section 281b(a) was enacted. 5 U.S.C. 281b(a) is Section 3(a) of the Customs Reorganization Act of March 3, 1927 (44 Stat. 1381, 1382), which abolished the Division of Customs in the Treasury Department and created in its stead a Bureau of Customs. This reorganization within the Treasury Department was for the purpose, as manifest from its legislative history, of retaining general supervisory authority in the Secretary of the Treasury over customs matters while at the same time relieving him of the requirement of personal action in these matters. The House Committee on Ways and Means, in its report recommending the passage of the proposed legislation (H.R. 10729, 69th Cong.), stated in defining its general purpose (H. Rep. No. 758, 69th Cong., 1st Sess., pp. 1-2):

> The defects of the present system are believed to be many, and among the more important may be mentioned the fact that under the existing organization the Secretary of the Treasury is required to pass upon a multitude of details involving a highly specialized and intricate branch of the law in the course of its administration in the collection of customs duties. *The bill will enable the Secretary to impose this duty upon the commissioner of customs while retaining general supervision*

and control over all customs officials. [Italics supplied] [3]

And in discussing the provisions of the bill, the Committee noted with particular reference to Section 3, the section here involved (*ibid.* pp. 2-3):

> The administration of the existing customs laws is vested directly in the Secretary of the Treasury. *Your committee believes that the secretary should be charged with full responsibility, but that he should be relieved of the necessity of personal action.* Section 3 of the bill authorizes the secretary to confer or impose upon the commissioner of customs, or any of the officers of the bureau of customs, any of the rights, privileges, powers, or duties conferred or imposed upon him in respect of the importation, entry, or exclusion from importation into the United States. [Italics supplied] [4]

---

[3] The initial report of the Senate Committee on Finances on the proposed legislation adopted the House Committee's report. See S. Rep. No. 890, 69th Cong., 1st Sess. The Senate Committee's report on recommittal does not refer to this phase of the bill. S. Rep. 1198, 69th Cong., 2d Sess.

[4] Similar comments were made during the House debates on H.R. 10729. For example, in advocating the passage of H. Res. 237, providing for the immediate consideration of H.R. 10729, Rep. Snell, a member of the House Ways and Means Committee, explained (67 Cong. Rec. 8318):

> It has been understood for some time that there is a great need for a change in the carrying out and the enforcement of the custom laws of the country, and that certain detail work that is under present law performed by the Secretary of the Treasury himself should be placed in the hands of some bureau commissioner with authority to act in the place of the Secretary of the Treasury. While the bill does not give any additional powers to the

The validity of the Secretary's delegation is further buttressed by the broad scope of the permissible delegation of authority sanctioned by Section 643 of the Tariff Act of 1930 (46 Stat. 761). That Section, which is entitled "Application of Customs Reorganization Act", provides that "the rights, privileges, powers, and duties vested in or imposed upon the Secretary of the Treasury by this Act[5] shall be subject to the provisions of" 5 U.S.C. 281b(a). Inasmuch as Section 466 of the 1930 Tariff Act deals with Rev. Stat. 3115 (46 Stat. 719), Section 643 indicates that the authority to delegate contained in Section 281b(a) is wide enough to include Rev. Stat. 3115, or at least, so broadens that authority.

Also supporting the delegation is the fact that the Treasury Department, for at least twenty years, has construed Section 281b(a) as permitting delegation of authority under Rev. Stat. 3115 to the customs officials (*supra*, p. 8, fn. 1) and many thousands of cases have been disposed of on the basis of that delegation. Such an adminis-

---

Secretary of the Treasury or to anyone in the departments, nor in any way repeals existing law, it does give power to detail such authority to a commissioner of customs.

See, also, 67 Cong. Rec. 8322.

[5] In codifying this provision as 19 U.S.C. 1643, the reference is limited to "this chapter," *i.e.*, Chapter IV, which, since it consists only of 19 U.S.C. 1001-1654, does not include the sections (19 U.S.C. 257, 258) here involved. The original statutory provision is, however, controlling. 1 U.S.C. (Supp. IV) 204(a); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, fn. 31 on p. 51.

trative construction "is entitled to great weight, 'and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required' *United States* v. *Jackson*, 280 U.S. 183, 193;" *United States* v. *Citizens Loan Co.*, 316 U.S. 209, 214; *United States* v. *Madigan*, 300 U.S. 500, 505; *Bowen* v. *Johnston*, 306 U.S. 19, 29-30; *Boske* v. *Comingore*, 177 U.S. 459, 470.

(b). Even if there were a doubt as to the validity of the delegation, the resolution of that question does not have sufficient prospective importance to warrant this Court's review. While Section 1 of Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935) transferred, with certain exceptions not here relevant, all functions of all other officials of the Department of the Treasury and all functions of all agencies and employees of such Department to the Secretary of the Treasury, Section 2 empowered the Secretary to delegate these functions to any officer, employe or agency of the Department. Acting under this authority, the Secretary of the Treasury has reaffirmed the delegations in effect prior to the Reorganization Plan. 15 Fed. Reg. 6521.

2. *Requirement of Administrative Hearing:* (a). There is no merit to petitioners' claim that they had a right, constitutional or statutory, to an administrative hearing on their petition for remission. Petitioners' assertion of a constitutional right to a formal administrative hearing is pred-

icated on the claim that their failure to pay the assessment subjects their vessel to possible forfeiture (Pet. pp. 9-10).[6] But this claim confuses Rev. Stat. 3115 with its companion Rev. Stat. 3114. The subjection to possible forfeiture arises not under Rev. Stat. 3115 but rather under Rev. Stat. 3114 pursuant to which the original assessment was made and which, after providing for the assessment, goes on to prescribe:

> * * * and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. * * *

And whatever constitutional rights to a formal hearing petitioners might have as a result of the assessment, with its concomitant liability to forfeiture, are fully preserved by Congress' provision of review thereof by the Customs Court, the Court of Customs and Patents Appeals and, on certiorari, by this Court. Sections 514 and 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, 1515 (now 28 U.S.C. 1583, 2637), 28 U.S.C. 1541, 1252, 1256. The judicial review so provided is more than ample to protect petitioners' rights, for the Customs Court's review is not limited to

---

[6] It should be noted that even the District Court which ruled in favor of petitioners did not hold that they had a constitutional right to a hearing (R. 11).

a determination whether there was sufficient evidence to support the administrative conclusion, as is normally the test in judicial review of administrative actions, but rather extends to a complete *de novo* hearing, with the introduction of new evidence, cross-examination of witnesses, etc., on the validity of the assessment. In short, petitioners' vessel became subject to seizure and forfeiture under Rev. Stat. 3114, not Rev. Stat. 3115 and petitioners' constitutional rights, if any, under Rev. Stat. 3114 are fully protected.

In contrast to Rev. Stat. 3114, Rev. Stat. 3115 does not impose any liability to forfeiture for failure to pay the assessed duty; instead it provides for relief from the possible forfeiture under Rev. Stat. 3114 should the petition for remission be granted. Petitioners have no constitutional right to a hearing on their petition for remission, since they are without a constitutional right to have the duty remitted. Congress has the power under Article I, sec. 8, cl. 1 of the Constitution to require payment of the duty on the imports covered by Rev. Stat. 3114 without reference to how or why the repairs were made, and hence its authorization to the Treasury Department to remit the duty if the prescribed conditions are fulfilled merely constituted an act of "legislative grace." Cf. *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440; *Helvering* v. *Bankline Oil Co.,* 303 U.S. 362, 366; *Deputy* v. *DuPont,* 308 U.S. 488,

493; *Anderson* v. *Helvering,* 310 U.S. 404, 408; *Interstate Transit Lines* v. *Comm'r,* 319 U.S. 590, 593. Plainly, therefore, petitioners do not have a constitutional right to the remission of the duty, or to a hearing on the denial of remission.

(b) Nor do petitioners have a right under Rev. Stat. 3115 to a formal administrative hearing. Rev. Stat. 3115 authorizes the granting of petitions for remission, not after "hearing on the record" or even "hearing", but rather on "good and sufficient evidence". The pertinent language of Rev. Stat. 3115 is now at least 85 years old, having been enacted into law for the first time in 1866 as part of the original statute which, with amendments, has become the present 19 U.S.C. 258. Act of July 18, 1866, 14 Stat. 184. With the passage of time, the phrase has become encrusted with the definite gloss that no formal hearing was required thereunder. The administrative practice of the Treasury Department for very many years has been to permit applicants for remission to submit written documents in support of their petitions, to hold informal conferences, when requested by the applicants, but to act upon the petition for remission without a formal hearing. Not only has this administrative construction of the phrase not been questioned by anyone, including Congress, but Congress has reenacted Rev. Stat. 3115 on at least two separate occasions (Section 466 of the Tariff Act of 1922, 42 Stat. 957-958;

Section 466 of the Tariff Act of 1930, 46 Stat. 719) without indicating disapproval, and has thereby presumably adopted this construction. See, *e.g.*, *Missouri* v. *Ross*, 299 U.S. 72, 75 and cases there cited; *United States* v. *South Buffalo R. Co.*, 333 U.S. 771; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469. Thus, it has been firmly settled that formal hearings on petitions for remission are not required as a statutory matter.

(c). In these circumstances, Section 5 of the Administrative Procedure Act relating to hearings is inapplicable. That Section does not by itself give rise to a right to a formal hearing, but together with Sections 7, 8 and 11 of the Act merely provides procedures to be followed in cases where such hearings are provided for either expressly or impliedly by the substantive statutes or, as held in the *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, required as a matter of constitutional right. This is clear from the unambiguous language of Section 5, the introductory clause of which defines the scope of the Section as embracing

> every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing. [Italics supplied.]

The legislative history of the Act fully accords with this language by making manifest a Congressional desire to avoid creating a right to a hearing where no such right existed previously. Thus the

Senate Judiciary Committee's Comparative Print of 1945, Sen. Doc. No. 248,[7] pp. 21-22, contains the following statement:

> The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which *Congress has not required* orders to be made upon a hearing, * * *. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing. [Italics supplied.]

And the same report, in discussing Section 7, specifies that "the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute." Sen. Doc. No. 248, p. 28.[8]

In recognition of the Congressional desire to limit the Section's scope, this Court in holding, in

---

[7] Senate Document No. 248 is a compilation of the legislative history of the Administrative Procedure Act. It includes the committee reports, debates and the 1945 hearings before the House Committee on the Judiciary.

[8] See, also, Sen. Doc. No. 248, pp. 202, 226 (Sen. Rep. 752, 79th Cong., 1st Sess.); pp. 247, 260 (H. Rep. 1980, 79th Cong., 2d Sess.); p. 359 (remarks of Rep. Walter, House sponsor of bill); p. 79 (testimony of the Chairman of the American Bar Association's Committee on Administrative Law); cf. Hearings before Senate Committee on Judiciary, on S. 674, 675, 918, 77th Cong., 1st Sess., pp. 1390, 251, 148-149, 791-992.

the *Wong Yang Sung* case, that Section 5 and its companion sections were applicable to hearings which are read into a statute to sustain its constitutionality, carefully pointed out that it did not cover hearings of less than statutory dignity. Mr. Justice Jackson wrote (339 U.S. at 50):

> We think that the limitation to hearings "required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority.

Accordingly, inasmuch as formal hearings on petitions for remission were not held by compulsion, either as a constitutional or statutory matter (see *supra*, pp. 13-19), nor were they even afforded by the Treasury Department by "regulation, rule, custom, or special dispensation" (*Wong Yang Sung* v. *McGrath*, *supra*), petitioners plainly were not entitled to a hearing complying with the requirements of Section 5 of the Administrative Procedure Act.

3. *Jurisdiction:* (a). We have assumed, until now, that the issues sought to be raised by peti-

tioners were properly raised in this proceeding. But the fact is that prior to the enactment of the Administrative Procedure Act,[9] and since 1891, shortly after its creation as the Board of General Appraisers (Section 12 of Customs Administration Act of 1890, 26 Stat. 131, 136),[10] the consistent position of the Customs Court, the court which has exclusive jurisdiction over customs matters generally (see 28 U.S.C. 1583, 1340), has been that courts are without jurisdiction to review denials of remission under Rev. Stat. 3115. This long-established position of the customs tribunals has been based on the ground not that review of a denial of remission under Rev. Stat. 3115 is outside of its jurisdiction as defined in 28 U.S.C. 1583 and its predecessor (*e.g.* 19 U.S.C. 1514) but rather that the determination whether to remit is committed by Rev. Stat. 3115 to the discretion of the Secretary of the Treasury whose decision is final and non-reviewable.[11] As

---

[9] We have not been able to find any customs courts decisions rendered since the enactment of the Administrative Procedure Act which involved this question.

[10] The Board of General Appraisers was redesignated as the Customs Court in 1926 (44 Stat. 669).

[11] *Waterman Steamship Corp.* v. *United States*, 30 C.C.P.A. (Customs) 119; *Mills & Gibb* v. *United States*, 8 Ct. of Cust. Apps. 31, T.D. 37164; *Portland California Steamship Co.* v. *United States*, C.D. 889, 13 Cust. Ct. 170; *Lykes Bros.* v. *United States*, C.D. 518, 6 Cust. Ct. 467; *Sullivan* v. *United States*, 44 Treas. Dec. 493; *Hammermill Paper Co.* v. *United States*, 48 Treas. Dec. 269; *J. W. V. Berry* v. *United States*, 57 Treas. Dec. 1067; *M. H. Folger* v. *United States*, T.D. 12305, G.A. 1077; *Pioneer Steamship Co.* v. *United States*, 37 Treas. Dec. 338; *William H. Ellery* v. *United States*, 42 Treas. Dec. 405; *E. E. Kelly & Co.* v. *United States*, 53 Treas. Dec. 1015.

stated in *Portland California Steamship Co.* v. *United States,* 13 Cust. Ct. 170, the most recent decision affirming the non-reviewability of the Treasury Department's action:

> Upon the admission that the duty was levied upon the cost of repairs or equipment, there can be no remission thereof except within the scope of section 3115, as amended, * * *, and there the sole authority for such remission is lodged in the Secretary of the Treasury. His discretion in the matter is not the subject of review. [13 Cust. Ct. at 174.]
>
> * * * * *
>
> Section 3115 * * * gives to the Secretary of the Treasury the sole authority within his discretion to remit the duty authorized in section 3114 * * * when in his opinion good and sufficient evidence is presented that the cost was incurred because of certain circumstances. Had Congress desired this court to have jurisdiction in the matter of deciding when duty should be remitted, it easily could have so indicated in the law [13 Cust. Ct. at 175].[12]

Not only have the customs courts since their inception denied the existence of jurisdiction to re-

---

[12] In none of the several decisions of the customs tribunals denying to themselves jurisdiction to review petitions for remission has the question of a constitutional right to a hearing on such petition for remission been raised. It may be that the customs court would have jurisdiction to consider such an issue in connection with a petition for remission, if properly raised. See *infra,* fn. 13, pp. 23-24.

view these discretionary decisions of the Treasury Department but, as pointed out in *Waterman Steamship Corp.* v. *United States,* 30 C.C.P.A. (Customs) 119, where the Court of Customs and Patent Appeals reexamined the background of this holding, Congress has presumably approved this abstinence from interference with the Treasury Department's action. Although long before 1922, it had become established, as far as the customs tribunals were concerned, that determinations under Rev. Stat. 3115 were committed to the Treasury's unreviewable discretion, Congress in Section 466 of the Tariff Act of 1922 (42 Stat. 957-958) amended and reenacted Rev. Stat. 3115 without evidencing any disapproval of this construction and without altering the critical language here involved. In addition, although subsequent to the 1922 Act, the customs tribunals continued their reading of Rev. Stat. 3115, Congress again reenacted Rev. Stat. 3115 as part of Section 466 of the Tariff Act of 1930 (46 Stat. 719) without manifesting any disagreement with the customs tribunals and without any changes relevant here. Since "so far as the issues here are concerned, section 3115 * * * [as it now reads] is precisely the same as section 3115 which was a part of section 466 of the Tariff Act of 1922, and is substantially the same as section 3115 of the Revised Statutes as originally enacted in 1866 (R.S. 2d ed. 1878, p. 598), it must be presumed that the construction of [both the original] section 3115 of the Revised Statutes and

[the amended] section 3115 which was a part of section 466 of the Tariff Act of 1922 met with the approval of the Congress. Accordingly, the doctrine of legislative approval of judicial interpretation and construction of the provisions in question is applicable in the instant case. * * *" *Waterman Steamship Corp.* v. *United States, supra,* at 126, see also *supra,* pp. 16-17.

(b). Nor is this absence of jurisdiction to review denials of remission modified in any way by the Administrative Procedure Act. Since determinations on these petitions are within the unreviewable discretion of the Treasury Department, *supra,* pp. 19-23, the Department's action on these petitions plainly constitute "agency action [which] is by law committed to agency discretion" exempt by the introductory language to Section 10 of that Act from the judicial review dealt with in that Section.

Moreover, even if these refusals to remit were not within the agency discretion exemption of APA's Section 10, it would not follow that review may be had in the instant proceeding. In the first place, Congress has provided in the customs courts a special system of courts generally to review customs matters [13] and Section 10(b) of the Adminis-

---

[13] *United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 152; *Nichols* v. *United States*, 7 Wall (74 U.S.) 122; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); *David L. Moss Co.* v. *United States*, 103 F. 2d 395 (C.C.P.A.); *Riccomini* v. *United States*,

trative Procedure Act permits review by district courts only "in the absence or inadequacy" of "any special statutory review proceeding *relevant to the subject matter in any court specified by statute*" (italics supplied). Inasmuch as the action taken under Rev. Stat. 3115 unquestionably related to a customs matter, it would seem that the review provided by the customs courts constitutes a special statutory proceeding relevant to the subject matter within Section 10(b) and consequently that the review, if any, of these determinations may be by the customs courts.

In the second place, assuming review, if any, were to be available in a district court, rather than the customs courts, such review would not be within the scope of the instant proceeding. This is a suit by the Government to collect the duties which concededly were properly assessed under Rev. Stat. 3114, and even a failure to remit under another statute, Rev. Stat. 3115, does not constitute a defense, "since there has been no remission in any event" (R. 20). "The failure of the Secretary to exercise the discretion vested in him might, in a proper case, serve as the basis for a petition for

---

69 F. 2d 480 (C.A. 9); *Boston Wool Trade Assn.* v. *Snyder*, 161 F. 2d 648 (C.A. D.C.); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C.A. 2); *Gulbenkian* v. *United States*, 186 Fed. 133 (C.A. 2). As several of these cases indicate the customs courts have jurisdiction to pass upon constitutional questions raised in proceedings properly before them. See, also, in this connection H. Rep. No. 308, 80th Cong., 1st Sess. ("Revision of Title 28, United States Code") pp. A 105, 141-142.

mandamus against him in a court having power to issue writs of mandamus, but such failure could not possibly constitute a defense to an action in a District Court to collect the duty assessed" (R. 22-23).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
SAMUEL D. SLADE,
MELVIN RICHTER,
Attorneys.

DECEMBER, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE 1952 977222 476

34

Office - Supreme Court, U. S.
FILED
DEC 22 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
1020 Court Square Building,
Baltimore 2, Maryland,
Counsel for Petitioners.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
STATEMENT	1
ARGUMENT	1
First Point — Reply to the Argument of the United States that the Remission Power of the Secretary of the Treasury Under Rev. Stat. 3115 is Delegable	1
Second Point — Reply to the Argument of the United States that Petitioners Had No Right to an Administrative Hearing on Their Petition for Remission Under Rev. Stat. 3115	5
CONCLUSION	7

Table of Authorities Cited

Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329	6
Riss & Co., Inc. v. U. S., mem. 341 U. S. 907, 95 L. Ed. 1345, reversing 96 F. Supp. 452	5
Wong Yang Sung v. McGrath, 339 U. S. 33	5

Statutes

Rev. Stat. 3114 (19 U. S. C. A. 257)	2, 3, 5
Rev. Stat. 3115 (19 U. S. C. A. 258)	1, 2, 3, 4, 5, 6
5 U. S. C. A. 281 b (a)	2, 3, 4
Tariff Act of 1922 sec. 465	2, 3
Tariff Act of 1922 sec. 466	2, 3
Tariff Act of 1922 sec. 498 (9)	2
Tariff Act of 1930 sec. 401	3
19 U. S. C. A. 1401 (c)	4
Reorganization Plan No. 26 of 1950	4
Immigration Act of 1917, section 9	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 404

THE COTTMAN COMPANY, A BODY CORPORATE, AND MARYLAND CASUALTY COMPANY, A BODY CORPORATE,

Petitioners,

VS.

UNITED STATES OF AMERICA

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

Pursuant to paragraph 4 (a) of Supreme Court Rule 38, petitioners file herewith their brief in reply to the brief for the United States filed in December, 1951, in opposition to petition for certiorari.

ARGUMENT

I. Reply to the Argument of the United States that the Remission Power of the Secretary of the Treasury Under Rev. Stat. 3115 is Delegable.

Petitioners maintain that there is no Congressional authority for the delegation by the Secretary of the Treasury of his duties under Rev. Stat. 3115 with respect to remis-

sion of duties on expenses of vessel repairs. (brief in support of petition, pp. 14, 15). The Government does not dispute that the Secretary's authority to delegate is limited by 5 U. S. C. A. 281 b (a)* to his duties in respect of the importation of "merchandise."

Notwithstanding the opinion of the Court of Appeals that vessel repairs are "reasonably classified" as merchandise within the meaning of 5 U. S. C. A. 281 b (a) (R. 22), the Government on page 9 of its brief in opposition concedes that the dictionary definition of "merchandise" does not extend to vessel repairs. It is, however, argued by the Government that the vessel repairs embraced by Rev. Stat. 3115 have been expressly treated by Congress as being merchandise. In support of this argument reference is made to Section 498 (9) of the Tariff Act of 1922 and the amendment thereof by the Tariff Act of 1930. (brief for the United States in opposition, p. 9). While the Court of Appeals has agreed that those sections support the inference the Government seeks to draw (R. 22), petitioners submit that this reasoning will not bear analysis.

Section 498 (9) of the Tariff Act of 1922 authorized the Secretary to prescribe rules and regulations for the declaration and entry of merchandise within the provisions of Rev. Stat. 3114 and Rev. Stat. 3115. The amendment to Section 498 (9) effected by the Tariff Act of 1930 added, following the words "merchandise within the provisions of Section

---

*"5 U. S. C. A. 281 b (a) The Secretary of the Treasury is authorized to confer or impose upon the Commissioner of Customs or any of the officers of the Bureau of Customs any of the rights, privileges, powers, or duties, in respect of the importation or entry of merchandise into, or exportation of merchandise from, the United States, vested in or imposed upon the Secretary of the Treasury by the Tariff Act of September 21, 1922, (ch. 356, 42 Stat. 858), or any other law." (This statute is erroneously referred to in petitioners' Brief in Support of Petition as 18 U. S. C. A. 281 (b).).

465 (Rev. Stat. 3114) and 466 (Rev. Stat. 3115) of this Act," the parenthetical phrase "(relating to supplies, repairs and equipment on vessels and railway cars)."

The Government's argument fails to take into consideration the fact that "expenses of repairs" is only one of several classifications referred to in Rev. Stat. 3115. Others are "equipments," "boats," "repair parts" and "materials." The latter may perhaps be said to be within the definition of "merchandise," but "expenses of repairs" are not. Inasmuch as there are items enumerated in Rev. Stat. 3115 to which the term "merchandise" as used in Section 498 of the Tariff Act of 1922 can sensibly apply, there is neither necessity nor justification for straining the definition to include items to which the term cannot sensibly apply. The addition of the parenthetical language by the Tariff Act of 1930 does not add any force to the Government's argument. That language beginning as it does with the words "relating to," is obviously intended to be merely descriptive of the subject matter of Section 465 and 466. It ought not be given any more significance than that, and certainly cannot justify the conclusion that anything in those sections which is not "merchandise" should become so. From the mere fact that Congress gave the Secretary authority to prescribe rules and regulations with respect to importation of merchandise in Rev. Stat. 3115, it does not follow that Congress intended to broaden the right to delegate conferred by 5 U. S. C. A. 281 b (a) to include items within Rev. Stat. 3115 which are not within the ordinary meaning of the term.

The inferences sought to be drawn are even more difficult to sustain in view of the definition of "merchandise" found in Section 401 of the Tariff Act of 1930 (Title 19 U. S. C. A.

1401 (c).).* It is provided there that "the word 'merchandise' means goods, wares and chattels of every description —." In enacting 5 U. S. C. A. 281 b (a) if Congress, by authorizing the delegation of duties in respect to importation of "merchandise," had intended to extend the meaning of that term beyond the meaning given it in the Customs Laws themselves certainly it would have more plainly said so.

If Congress did in fact omit to authorize delegation of duties with respect to expenses of repairs, as petitioners contend, this omission cannot be supplied by judicial decision.

Contrary to the Government's contention on page 12 of its brief in opposition the long-standing administrative construction of Title 5 U. S. C. A. 281 b (a) as permitting delegation and the fact that many cases have been disposed of on the basis of that delegation ought not to be entitled to "great weight" in these circumstances. The validity of the delegation need necessarily be questioned in this case only insofar as the delegated authority has been exercised with respect to items which are not "merchandise." To the extent that the delegated authority has been exercised with respect to items within Rev. Stat. 3115 which may be merchandise, such as equipments, boats or materials, its validity need not be determined here.

The effect, if any, of Reorganization Plan No. 26 of 1950 (referred to at page 13 of the Government's brief in opposition) is, of course, irrelevant here. In any event, petitioners question that it has been shown to have even prospective effect in this situation.

---

* Section 401 of the Tariff Act of 1922 contained a similar provision, codified as 19 U. S. C. A. Section 231.

II. Reply to the Argument of the United States that Petitioners Had No Right to an Administrative Hearing on Their Petition for Remission Under Rev. Stat. 3115.

Petitioners concede that the Administrative Procedure Act does not in and of itself give rise to a right to a hearing, but contend upon the basis of the language used by this Court in *Wong Yang Sung v. McGrath,* 339 U. S. 33, 41, that Federal Courts are obliged to re-examine administrative matters in the light of the remedial purposes of the Administrative Procedure Act wherever the opportunity is presented. In that case, this Court upset long-established practices of the Immigration Service and in *Riss & Co., Inc., v. United States,* mem. 341 U. S. 907, 95 L. Ed 1345 reversing 96 F. Supp. 452, this Court overturned long-established practices of the Interstate Commerce Commission. The *Wong Yang Sung* case was decided on broad grounds and it is petitioners' contention that the decision is correctly interpreted as calling for a construction of statutes dealing with administrative matters so as to subject administrative action to the requirements of the Administrative Procedure Act wherever reasonable construction will allow, without regard to prior agency construction or the so-called doctrine of legislative approval.

Petitioners reiterate that they are entitled to a hearing as a matter of due process of law, but will not dwell further here on the unrealistic and technical construction of Rev. Stat. 3114 and Rev. Stat. 3115 required to sustain the Government's view that no constitutional right to a hearing exists under Rev. Stat. 3115. Without regard to that, however, petitioners say the language of Rev. Stat. 3115 fairly imports the need for a hearing. This Court is respectfully asked to compare the language of Rev. Stat.

3115 with that of Section 9 of the Immigration Act of 1917. The latter statute provided that *"if it shall appear to the satisfaction of the Secretary of Labor"* that any alien has been brought into the United States in violation of provisions declaring it unlawful to bring to the United States certain aliens afflicted with certain diseases and disabilities which might have been detected at the time of foreign embarkation by competent medical examination the person or transportation company bringing such alien to the United States shall pay a stated fine. In *Lloyd Sabaudo Societa Anonima v. Elting,* 287 U. S. 329, this Court construed that statute. At page 335 of 287 U. S. it was specifically pointed out that the statute did not involve constitutional rights. The language is certainly less indicative of the need for a hearing than is the language of Rev. Stat. 3115 which explicitly requires the Secretary of the Treasury to pass upon "evidence." Yet, while Section 9 of the Immigration Act of 1917 has been construed as contemplating a hearing (287 U. S. 329, 336) Rev. Stat. 3115 has, without judicial approval, been permitted to acquire (in the language of the Government's brief p. 16) the "definite gloss" that no hearing is required. Petitioners contend that the above comparison illustrates that the administrative interpretation of Rev. Stat. 3115 is not justified by the language of the statute and is erroneous. This case raises for the first time for judicial decision the question of whether the language of Rev. Stat. 3115 properly does or does not require a hearing. Petitioners maintain that it does and respectfully suggests that this Court so decide.

CONCLUSION

For the reasons stated above and in petitioners' brief heretofore filed in support of petition, the writ of certiorari prayed for should be granted and the decision of the United States Court of Appeals Fourth Circuit reversed.

Respectfully submitted,

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
Counsel for Petitioners.

December, 1951.